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No. 98-1619

In The

Supreme Court of the United States

WILLIAM D. FERGUSON; ELIZABETH T. FERGUSON; BONNIE P. TUCKER; JAY T. FRANKEL; BARBARA JEAN COFFMAN,

Petitioners,

v.

CITY OF PHOENIX, A MUNICIPALITY; LYLE RODABOUGH; AND JANE DOE RODABOUGH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The court of appeals held that petitioners, to be entitled to damages under the Americans With Disabilities Act Title II and Section 504 of the Rehabilitation Act, must show a public entity's "discriminatory intent." Should the Court deny certiorari of this issue where the Ninth Circuit's decision is fully compatible with this Court's opinions in *Gebser, Franklin,* and *Guardians,* and where the circuits are not in conflict?

II. The district court held that discriminatory intent means at least "deliberate indifference." Should the Court deny certiorari of this issue where the Ninth Circuit did not decide the issue, where the evidence failed to show intent under any definition of that term, and where the deliberate indifference standard is appropriate in any event?

III. Should the Court decline to review the issue of whether petitioners raised a genuine issue of material fact, where they claimed no disputed issue of fact below and where both lower courts found no genuine issue of material fact?

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STATEMENT OF THE CASE

In an effort to make it sound like respondents (hereafter collectively "the City") "intentionally discriminated" against petitioners, or were "deliberately indifferent" to petitioners' federally-protected rights, petitioners misstate the record in several respects.

A. The petition misrepresents the liability phase of this case. No court adjudged the City "liable" for discrimination.

The petition erroneously suggests that the City was found "liable" for discriminating against them, and that petitioners had "proven liability." Pet. at i, 6, 19. No such determination was ever made. The gist of petitioners' complaint was that the City discriminated against them by utilizing technology that required TDD callers to 911 to press the space bar on their TDD's which would emit a tone to alert the 911 operator that the call was from a TDD. The only issue decided during the liability phase of the case was whether a Department of Justice Technical Assistance Manual "Guideline" – which prohibited a 911 provider from having a space bar requirement for TDD users – was reasonable. Pet. App. at 61. The City had argued that the Guideline was arbitrary and non-binding because it failed to account for the fact that, at the time the 911 calls were made here, no technology existed to eliminate the space bar requirement. Pet. App. at 61. The district judge, however, nevertheless held that the

Guideline was reasonable. Pet. App. at 64, 10. It did not hold that the City "discriminated against plaintiffs."[1]

The Consent Decree signed by the trial court itself states, "This Order does not constitute an adjudication or finding on liability, nor shall it be construed as an admission by the City or a finding of wrongdoing or violation of any applicable Federal law or regulation." Pet. App. at 45. Petitioners therefore err in suggesting that the lower court adjudged, or that they "proved" the City "liable" for discrimination.

B. The petition erroneously intimates that the City entered into the Consent Decree because liability "was proven" or because the City was found to have "discriminatory policies." In truth, the City entered the Consent Decree because it had already implemented new technology that satisfied petitioners.

The petition erroneously insinuates that the City was ordered in the Consent Decree to "modify its discriminatory policies." Pet. at 6. In truth, the City entered into the Consent Decree because, while the City's motion for summary judgment was pending in this case, the City learned of and already had begun implementing new technology

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[1] In fact, what the district court ruled was that the space bar requirement failed to provide the same 911 access to "no-tone" TDD users as for "tone-emitting" TDD users and hearing callers. Pet. App. at 64. Plaintiffs here were not "no-tone" TDD users and therefore were not even members of the class of persons whom the trial court found were treated differently.

that would eliminate the space bar requirement, thus satisfying plaintiffs' claim for injunctive relief.

Only after the City had begun the implementation did the district court rule that the previous technology treated "no-tone" TDD callers differently than "tone-emitting" TDD callers and hearing callers, and that the DOJ's Guideline prohibiting a space bar requirement was not arbitrary. Pet. App. at 64. Because the City had already taken steps to eliminate the space bar requirement, however, in June the City entered into a Consent Decree with plaintiffs and the Department of Justice agreeing to eliminate the space bar requirement, which resolved the liability portion of the case.[2]

C. The petition misrepresents the City's response to Ferguson's 911 calls.

1. The August, 1994 calls.

Petitioners' intimation that the City callously "hung up" on Ferguson, disconnected him, or refused to respond to his 911 calls, misstates the record. Pet. at 3-4. When Ferguson first called 911 from his TDD, the 911 operator answered the call three seconds later, but heard

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[2] Indeed, for two years after the Consent Decree, respondents were required to file periodic audit reports detailing the success of the new system. Pet. App. at 50. Petitioners conducted an on-site evaluation of the system, and had the right to return to district court if any disputes arose. *Id.* Neither petitioners nor the Department of Justice ever raised any objections or problems.

no TDD "tone."[3] Per police department policy for **all** silent 911 calls, the operator disconnected and immediately called plaintiff back. Hearing a busy signal, the operator requested U.S.West to break through the line and was advised of no conversation. The operator then heard another 911 operator taking Ferguson's second call through the TDD, which was answered in four seconds. Ferguson this time initiated the TDD tone, and the call was immediately transferred to the TDD station. The TDD operator sent the pre-programmed TDD message asking what the emergency was, but Ferguson did not respond. In accordance with policy for **all** silent 911 calls, an officer was dispatched to plaintiff's home on a Priority Two 911 hang-up. Pet. App. at 7.[4] The officer arrived at Ferguson's home less than 16 minutes after his first 911 call, well within the average response time for Priority Two calls from hearing persons. CR 14, ¶ 19-21.[5]

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[3] At the time Ferguson made his 911 calls, TDD calls rang into the 911 facility exactly the same way as regular 911 calls. The 911 operators responded to the calls in exactly the same manner and with exactly the same speed. CR 14, ¶ 6. Because the calls rang in to the 911 Center exactly the same way as regular calls, a TDD caller had to initiate an audible "tone" that would indicate that this was a TDD call. There was no 911 system available at that time that could automatically "detect" (without the caller initiating an audible tone) that a call was coming from a TDD system. CR 14, ¶ 7.

[4] In the meantime, Ferguson made two more calls, again failing to initiate the audible tone. *Id.* Since the caller's address was Ferguson's, however, the information was stored with the incident already dispatched.

[5] CR refers to the Clerk's Index of Record. These items will be included in the Joint Appendix should the Court accept certiorari.

2. January 1995 calls

On January 30, 1995, Ferguson called 911 to complain about kids throwing rocks at his car. The call was answered in 4 seconds but no audible tone or voice was heard. The operator disconnected and immediately called Ferguson back and received a busy signal. Upon asking U.S.West to interrupt the line, the operator received no answer and immediately dispatched an officer to Ferguson's home on a Priority Two 911 hang-up call. CR 14, ¶ 22-23.

In the meantime, Ferguson made three more phone calls, and this time he did initiate the tone. Although these operators did not initially recognize the tone, the calls were processed on the TDD, and two operators conversed with Ferguson. The officer, however, had been dispatched to his home after the first "no response," in accordance with department policy for all 911 calls, and arrived less than ten minutes later – the same as it would have been if the call had been placed from a regular telephone. CR 14, ¶ 24, 25, 28.

D. The petition ignores the City's undisputed Herculean efforts to provide maximum access to TDD users accessing Phoenix 911. Both lower courts found no evidence of an intent to discriminate, regardless of how "intent" is defined.

Petitioners' attempt to portray the City as callously indifferent to their attempts to access 911 is wholly unsupported by the record. As the district court specifically noted, "the evidence shows a diligent effort on the

part of defendants to upgrade their 911 system." Pet. App. at 36. *See also* Pet. App. at 40.

1. Commander Rodabough promptly responded to Ferguson's complaint and evaluated the 911 Center's TDD capabilities.

After his August calls to 911, Ferguson filed a complaint with the City. This was the first complaint the City had received about a problem accessing 911 via TDD. Within two weeks, Cmdr. Rodabough, Commander of the Phoenix Police Department's Communications Bureau, had the matter investigated and responded to Ferguson. In his response, Rodabough indicated that he had evaluated the TDD system, was dissatisfied with it, and had begun exploring options to improve service. CR 95, ¶ 18.

2. The City upgraded its system twice in the next year – in April, 1995, and again in August, 1995.

Cmdr. Rodabough thought the previous system left too much room for human error, so he began to search for a system that would better serve the needs of the hearing impaired. U.S.West, which controls Phoenix 911, recommended a new "detector" system which the City installed in April or May of 1995. The detector system was not satisfactory, however, and the City had it removed and continued its search for another solution. CR 95, ¶ 17, 19.

U.S. West next suggested a diverter system which would pick up the TDD Baudot tone and automatically

"divert" the call to the TDD machine, eliminating any human error factor in recognizing the tone (which sounds very much like a fax tone).[6] With the diverter, regardless of whether the call came in to a workstation equipped with a TDD machine or not, the call would still have to be diverted from the phone equipment to the TDD equipment. At that point, the 911 operator could simply begin conversing with the caller. CR 95, ¶ 20; CR 14, ¶ 11. Additionally, any TDD call would automatically be bumped ahead of any other waiting calls. CR 14, ¶ 9.[7]

The Communications Bureau received a brochure for the diverter equipment. The brochure stated, **"Meets all ADA requirements for "Direct Access" to emergency telephone lines, including 911."** CR 229, Exhibit D. The brochure helped Cmdr. Rodabough and his staff decide to try the diverter, which they installed in August, 1995. CR 229, ¶ 2; CR 95, ¶ 20. As suggested in the diverter brochure, **all** silent calls were treated the same, that is, when the operator received silence on the line and could

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[6] Petitioners' assertion that "properly trained" 911 operators can recognize TDD tones because they are "easily distinguishable from" fax or computer modem tones misrepresents the record. Pet. at 3, n.1. The record is devoid of evidence about "properly trained" operators; moreover, the record establishes that the TDD tones sound just like fax tones (CR 95, ¶ 20).

[7] Petitioners' slight that the City at that time "only" had two operator positions equipped with TDD is unfounded. Pet. at 4. Additional TDD equipment would not have eliminated the need to transfer to the TDD. Moreover, there is no evidence that Phoenix 911 needed more than two TDD machines to handle the relatively few TDD calls that it received yearly.

not reach the caller with a call-back, an officer was dispatched to the caller's address on a Priority 2 "911 hang-up" call. CR 14, ¶ 16, 18, 23, 28.

3. The City kept evaluating its system to ensure that it was the best available.

In the summer of 1995, in a continuing effort to determine the best system available, Cmdr. Rodabough attended the National Emergency Number Association ("NENA") conference in Nashville. He specifically asked the NENA presenters about Phoenix's TDD system technology, and they did not recommend any changes to Phoenix's 911 system. CR 95, ¶ 21; ER 509-10.[8] He came away from the seminar believing that "we are in complete compliance with the ADA." *Id.* Cmdr. Rodabough and his staff nonetheless contacted their counterparts in Denver, San Diego and Los Angeles to find out what equipment and procedures those cities used to serve the hearing impaired. Based upon the information he had received, Cmdr. Rodabough believed in good faith that the City, with the new diverter system, had installed a state-of-the-art system which fully complied with the ADA. CR 95, ¶ 22.

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[8] ER refers to the Excerpt of Record required by Ninth Circuit Rule 30-1 to be filed in place of the F.R.A.P. 30 Appendix.

4. The City upgraded its TDD service yet again in September, 1995.

Again continuing in good faith to evaluate and upgrade its system, in September 1995, the City implemented another new procedure for communicating with TDD callers to 911. Upon receiving a silent call, an operator could press "5#" and automatically send a TDD message directing the potential TDD caller to press the space bar. Pet. App. at 56. If it was a TDD caller, once the caller pressed the space bar and emitted the tone, the diverter would automatically connect the caller with the TDD station. This transfer occurred almost instantly, within seconds.[9]

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[9] It was *after* this time that petitioners Tucker and Frankel/Coffman made their November and December 1995 calls to 911. By this time, of course, respondents were already in the process of evaluating, researching and upgrading the 911 system. Pet. App. at 40. Petitioners Frankel and Coffman were not even aware of the upgrades (CR 171). In fact, when Ms. Coffman later contacted 911, she was "pleased that [911] responded right away." She testified that she received the kind of response she hoped to receive each time she calls 911, and did not have any difficulties in communicating by TDD. Ms. Coffman testified that she does not believe the City of Phoenix intentionally discriminated against her. *Id.*

With respect to Tucker's call, the record demonstrates that Tucker was experiencing trouble getting through to 911 on her father's TDD that day; that the supervisor asked her to make some test calls; that during one of those test calls, an officer had already arrived on the scene; and that during the test calls, U.S. West detected and reported a potential line problem. (ER 188-190).

5. The City upgraded its system once again in the spring of 1996 to eliminate the space bar requirement and allow TDD capability from each operator's keyboard.

In late February 1996, just before the parties argued the City's pending motion for summary judgment, the City first learned of special keyboards that would allow TDD capability right from the keyboard. This new technology would permit each operator to "query" silent lines to determine if it was a potential TDD caller, and to call back via both hearing phone and TDD right from the keyboard. This would eliminate the need to press the space bar, for separate TDD equipment, and for the diverter system. CR 144.

Respondents immediately began researching whether they could utilize this technology at the Phoenix 911 Center, and informed the district court of this new development at the March 4, 1996 summary judgment oral argument. CR 127 at 20. By March 25, 1996, the City had not only determined technological compatibility, but had requested funding from the Police Chief's Office. CR 144, ¶ 4-5. By April 26, 1996, the date of the district court's first ruling, new keyboards had been ordered for each workstation. CR 155. The parties entered into the Consent Decree in June, 1996.

On July 10, 1996, less than six months after first learning of the new technology, the City completed installation of the new keyboards, which eliminated the need for TDD callers to press a space bar to emit Baudot tones. As far as the City knew, and as the undisputed record

demonstrates, before February 1996, no technology existed whereby the City could have eliminated the space bar requirement. CR 212; CR 14.[10]

E. The record is devoid of evidence that the City was notified of any problem with the space bar technology before Ferguson's complaint in this case and/or "turned a blind eye." The lower courts found exactly the contrary.

Both lower courts soundly rejected petitioners' argument, and their "evidence" from which they argued that respondents knew or should have known of discrimination or a space bar problem and turned a blind eye. Pet. App. at 40 ("To the contrary, the evidence shows that defendants acted both promptly and in good faith in attempting to upgrade their 911 service"); and at 15 ("There is nothing to show, even suggest, any deliberate indifference or discriminatory animus on the part of the City towards plaintiffs").

The record fully supports those rulings. Contrary to petitioners' assertion that the City "failed to train its 911 operators," Pet. at 4, the record is replete with evidence of extensive TDD training. The district judge specifically found no evidence that the City had any notice that its

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[10] The court of appeals erred in stating that the parties "disputed" whether or not the technology to eliminate the space bar requirement previously existed. Pet. App. at 16. Petitioners never even argued, let alone came forward with any evidence demonstrating that such technology existed before the City learned of and implemented it.

training was at all inadequate under the ADA. Pet. App. at 38.

Likewise, the trial court soundly rejected petitioners' contention, made yet again here (Pet. at 4-5), that the City was somehow put on notice of some problem with its space bar technology. For each of petitioners' claimed items of "notice," the trial court found that it "in no way creates an inference that the city was deliberately indifferent to the requirements of the ADA." Pet. App. at 33-40.[11] Even reviewing the trial court's factual analysis de novo, the appellate court concurred, Pet. App. at 16, finding that petitioners' evidence could not lead a rational trier of fact to find for them. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The record belies petitioners' attempt to paint a different picture.

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[11] Those items were: (1) a DOJ letter to the City advising of a settlement with the City of Los Angeles, which letter made no mention of the space bar, Pet. App. at 36, 67; (2) non-specific "complaints" made to the Arizona Council for the Hearing Impaired, which the City nonetheless **always** followed-up, Pet. App. at 39; (3) a promotional mailing of an E.A.S.E. training packet sent to the Mayor's office to get the City to buy it, Pet. App. at 36-37; (4) Ferguson himself restating his complaint about 911 at a public meeting, Pet. App. at 39; and (5) petitioner Tucker sending respondents' counsel pages from her legal treatise during the course of this litigation, Pet. App. at 38.

THE COURT SHOULD DENY THE PETITION

The Ninth Circuit's decision that damages are not available under the ADA Title II or the Rehabilitation Act absent a showing of discriminatory intent is fully consistent with this Court's decisions in *Franklin v. Gwinnett*, 503 U.S. 60 (1992), *Guardians Assoc. etc., et al. v. Civil Service Comm'n*, 463 U.S. 582 (1983), and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). Circuit court decisions are also in accord. The decision was plainly correct, and no conflict among the circuits is even asserted.

The Court also need not resolve the question of what "standard" of intent applies. The Ninth Circuit declined to resolve this issue because, as both lower courts found, the evidence in this case fails to even approach a showing of discriminatory intent under **any** previously-articulated definition of that term – discriminatory animus **or** deliberate indifference. In any event, the district court's application of the deliberate indifference standard was legally and factually appropriate.

Finally, the Court should not review petitioners' third question presented – whether they showed a genuine issue of material fact. Petitioners steadfastly maintained in the trial court that **no** genuine issue of fact existed. They argued in a cross-motion for summary judgment that they were entitled to damages as a matter of law. CR 219 at 2, 6. They cannot now assert that a fact issue exists. In any event, this purely factual matter is not worthy of this Court's review.

I. THE NINTH CIRCUIT'S OPINION IS PLAINLY CORRECT. ALL THE CIRCUITS THAT HAVE ADDRESSED THE ISSUE ARE IN ACCORD.

1. In *Guardians Assoc. v. Civil Service Comm'n*, this Court set forth the intentional discrimination standard necessary for obtaining compensatory damages under the 1964 Civil Rights Act, Title VI. Writing for the Court, Justice White said:

> **In the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations.**

462 U.S. 582, 103 S. Ct. 3221, 3223 (1983). The Title VI standard applies here because the Rehabilitation Act specifically incorporates Title VI's remedies for intentional violations, and the ADA Title II specifically incorporates the remedies of the Rehabilitation Act. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133. Pet. App. 71, 72.

Every other Title II/Rehabilitation Act case that has examined the issue has required a showing of intentional discrimination before allowing damages. *See e.g. Bartlett v. New York State Board of Bar Examiners*, 156 F.3d 321 (2d Cir. 1998); *Matthews v. Jefferson*, 29 F. Supp.2d 525, 535-36 (W.D.Ark. 1998); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 133 n.10 (D.Conn. 1997); *Tafoya v. Bobroff*, 865 F. Supp. 742 (D.N.M. 1994), *aff'd*, 74 F.3d 1250 (10th Cir. 1996); *Lewis "Toby" Tyler v. City of Manhattan*, 849 F. Supp. 1442 (D.Kan. 1994), *aff'd*, 118 F.3d 1400 (10th Cir. 1997); *DeLeo v. City of Stamford*, 919 F. Supp. 70, 72 (D.Conn.

1995); *Adelman v. Dunmire*, 1996 WL 107853 (E.D.Pa. 1996); *Miller v. City of Johnson City*, 1996 WL 406679 (E.D.Tenn. 1996); *Burke v. Commonwealth of Virginia*, 938 F. Supp. 320, 323-4 (E.D.Va. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997); *Wood v. President and Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir.1992). *See also Smith v. University of Washington Law School*, 2 F. Supp.2d 1324 (W.D.Wash. 1998) (Title VI). Petitioners have cited no authority holding that damages are available for unintentional discrimination.[12]

The intentional discrimination requirement for recovering compensatory damages should be contrasted with the standard for simply showing a violation of the Act, which does not require discriminatory intent. *Guardians, supra*, 103 S. Ct. at 3223. The issue at bar is not whether the City "violated" the ADA. *See* Pet. App. at 31. The only issue presented is whether petitioners are entitled to damages, which requires an examination of the City's intent. Consequently, petitioners' argument regarding the importance of accessibility to emergency services, Pet. at 13-15, is irrelevant to the analysis of the issue presented. No one disputes the importance of ensuring access to

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[12] Neither *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996) nor *Hernandez v. City of Hartford*, 959 F. Supp. 125 (D.Conn. 1997) holds that damages are an appropriate remedy for unintentional violations of Title II, as petitioners seem to assert. Pet. at 20, n.16. Both cases involved intentional discrimination, and *Hernandez* was an employment case. *Niece*, 922 F. Supp. at 1219; *Hernandez*, 959 F. Supp. at 134, n.10.

emergency services; but the standard for a violation is simply not an issue here.[13]

2. The ADA's legislative history also supports the Ninth Circuit's opinion, contrary to petitioners' assertion. Pet. at 11-12. In 1992, fully aware of the 1983 *Guardians* "no damages unless intentional" interpretation of the Civil Rights Act Title VI, Congress drafted Title II to specifically incorporate the remedies of § 504, which specifically incorporates the remedies – and the *Guardians* interpretation – of Title VI. Had the remedies under § 504 been inadequate, Congress would have broadened them when it enacted the ADA, rather than specifically incorporating them by reference. Congress is presumed to have known of the Title VI judicial interpretation when it enacted the ADA. *Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S. Ct. 866, 869-70 (1978).

Congress has never amended Title II/§ 504, either, despite the plethora of published judicial decisions limiting damages to cases of intentional discrimination. This contrasts with the 1991 and 1995 Congressional amendments to Title I which, for the first time, provided a limited damage remedy for intentional employment discrimination "in addition to" any relief authorized by the Civil Rights Act. 42 U.S.C. § 1981a(a)(1) and (b) (1991); 2 U.S.C. § 1311(a)(1) and (b)(3)(B) (1995). Had the ADA already "presumptively" required all plaintiffs to receive

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[13] Equating the standard for a violation with the standard for recovering damages is the mistake made by the dissenting judge in *Tyler v. City of Manhattan*, 118 F.3d 1400, 1407-1416 (10th Cir. 1997), whom petitioners cite extensively. Pet. at 14, n.11; at 15, n.13; and at 20, n.16.

damages, as petitioners argue, Pet. at 11, n.9, then enactment of the 1991 law giving damage rights to employment plaintiffs "in addition to" those under the Civil Rights Act, would have been unnecessary.

3. Petitioners err in suggesting that victims of unintentional discrimination are "left without a meaningful remedy." Pet. at 16, 19. Not only is injunctive relief available for unintentional violations of the Act, but it is the most effective means of furthering the law's policy to eliminate municipalities' discriminatory practices. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (the purpose of Title VI and Title IX is to protect people from discrimination; as opposed to Title VII, the purpose of which is to "compensate" people for past discrimination). Injunctions force public entities to spend their resources eliminating discriminatory practices for **all** disabled citizens rather than using those resources to pay large compensatory damage awards to benefit select individuals. Under no circumstances are public entities "absolved of the responsibility for redressing the injuries" resulting from discrimination, as petitioners argue. Pet. at 15.[14]

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[14] Rather than focus on the defendant's intent (or lack of it), petitioners would inflict damage awards on public entities simply because all discrimination is "abhorrent." Pet. at 16. This position fails to serve the purpose of the ADA – to actually eliminate the discriminatory practices, not to provide a windfall for the first plaintiff to reach the courthouse steps. It is precisely because most discrimination results from benign neglect, and can be quickly remedied with injunctive relief, that injunctive relief is most appropriate.

In cases of unintentional discrimination, injunctive relief is the most appropriate from the public entity perspective as well. Neither Title II, § 504, nor Congressional regulations specifically proscribes the space bar or any particular conduct.[15] Rather, because the needs of the disabled community are as widely divergent as the financial and practical circumstances among municipalities, the law remains flexible as to the practicalities of what municipalities must do to comply. For example, while a public entity need not take any action that would "fundamentally alter" its service, or result in "undue financial and administrative burden," 28 C.F.R. § 35.164, the practical application of these terms will differ depending on each municipality's circumstance. Keeping the obligations broad enough to be flexible, however, necessarily requires those obligations to be ill-defined; and municipalities are more likely to unintentionally discriminate where their obligations are not clear. Under these circumstances, injunctive relief to direct the entity into compliance is the most appropriate means of resolving the problem for all citizens. Damage awards are appropriate only where the entity is notified of plaintiff's needs and flagrantly or recklessly disregards them. *See Gebser, supra* (Title VI damage remedy would divert federal funding from beneficial uses where defendant is unaware of discrimination and is willing to institute prompt corrective measures).

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[15] Congressional regulations state only that local agencies must provide "direct access" to persons using TDD's. 28 C.F.R. § 35.162; Pet. App. at 73. According to the Department of Justice, "direct access" means the 911 provider cannot use a relay service. Pet. App. at 75-76.

4. Petitioners' insinuation that damages are a "presumptive" American "right" is inaccurate. Pet. at 17. The law presumes only that "all appropriate remedies" are available unless Congress has expressly indicated otherwise. It does not presume that damages are always appropriate. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 1032 (1992).[16] They were appropriate in *Franklin* precisely because the sexual harassment alleged was an intentional act of discrimination under Title IX; and compensatory damages are appropriate to redress intentional acts of discrimination. 112 S. Ct. at 1037. But neither the presumption nor "make whole remedies" applies to unintentional violations of Title VI. *Guardians*, 103 S. Ct. at 3229. Since § 504 and Title II expressly incorporate the remedies of Title VI, and no more, the presumption, if any, is that § 504/Title II plaintiffs' remedies are similarly limited to declaratory and injunctive relief in cases of unintentional discrimination.[17]

Here, the issue is not whether damages are available under Title II/§ 504, but whether they are appropriate. In

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[16] *Bell v. Hood*, 327 U.S. 678 (1946), like *Franklin*, holds that the federal courts have the jurisdiction to award "appropriate" relief as long as a cause of action exists under the Constitution or federal laws. 327 U.S. at 684. *Bell* does not hold that damages are appropriate for every claim, as petitioners insinuate. Pet. at 16. *See Gebser*, 118 S. Ct. at 1996 (interpreting *Bell*).

[17] *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 104 S. Ct. 1248 (1984), which petitioners cite at 17, n.14, does not help them here. Darrone alleged intentional discrimination in employment. The Court ruled that having done so, he could sue for backpay. The backpay was in the nature of equitable relief, not damages. *Darrone*, 465 U.S. at 630.

this regard, both lower courts correctly held that damages are not an appropriate remedy where the record is undisputed that the City, immediately after receiving Ferguson's complaint, went to great lengths to upgrade its entire TDD system and remedy the situation that Ferguson first brought to its attention. The lower courts' ruling comports with every published federal decision that has analyzed the subject and with the policy considerations outlined above. Certiorari should be denied.

II. THE COURT SHOULD DECLINE TO ADDRESS THE MEANING OF "INTENTIONAL DISCRIMINATION"

1. The Ninth Circuit did not resolve the issue of how to define the term "intentional discrimination" because the undisputed evidence showed no intentional discrimination by the City, regardless of how that term is defined. Pet. App. at 15. Moreover, as the district court noted, the parties "actually appear[ed] to agree on the relevant standard to apply." Pet. App. at 32 (referring to the deliberate indifference standard). For these reasons, this Court should similarly decline to address the issue. *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990) (declining to address question whose resolution is unnecessary to Court's decision on narrow question presented); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) (declining to consider question not considered by court of appeals).

2. The district court correctly determined the issue in any event. In *Gebser v. Lago Vista Indep. Sch. Dist.*, 524

U.S. 274 (1998), this Court declared that "deliberate indifference" is the correct standard for determining the availability of damages under Title IX. The *Gebser* holding applies because Title IX is modeled after Title VI, *Gebser*, 118 S. Ct. at 1997, the same statute from which the ADA directly takes its remedies.

Gebser's reasoning is also persuasive here. The Court noted that Title IX's express remedial scheme presupposes notice to the entity and an opportunity to rectify any violation. From this the Court reasoned that damages are appropriate only when the entity makes an "official decision" not to remedy the violation. This "official decision" presumes that the official with authority to act has notice of the discrimination and refuses to act, which roughly parallels the deliberate indifference standard. 118 S. Ct. at 1999. Title II of the ADA similarly applies to "official decisions," and thus implicates the deliberate indifference standard, because Title II applies to discrimination **by public entities**, not by individuals. Discrimination by public entities – as opposed to their employees – presupposes notice to the entity and an "official decision" to deny benefits or to not remedy a violation. For this reason, the district court appropriately applied the deliberate indifference standard.

It is precisely because the ADA Title II proscribes conduct by public entities that the *Gebser* Court's analogy to the deliberate indifference standard for municipal liability under 42 U.S.C. § 1983 applies with force here. The Court reasoned that a lower standard raises the risk that the entity would be liable in damages not for its own official decision, but for its employees' independent actions. Not surprisingly, this is the same reasoning the

district court below used in granting the City summary judgment. Pet. App. at 32, 67.

Finally, *Gebser* itself belies the petitioners' argument that the deliberate indifference standard is reserved for punitive damages. Pet. at 21. *See also Board of County Commissioners v. Brown*, 520 U.S. 397 (1997) (deliberate indifference triggers municipal liability under 42 U.S.C. § 1983; requiring municipal decisionmakers to be aware of and acquiesce in pattern of constitutional violation).

3. Arguably, the district court's "deliberate indifference" standard does not conflict with the Second and Seventh Circuits' definition of "intentional discrimination," as petitioners assert. Pet. at 19-21. In *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998) and *Love v. McBride*, 896 F. Supp. 808 (N.D.Ind. 1995), *aff'd sub nom Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996), the courts defined "intentional discrimination" as a knowing, deliberate or willful refusal to accommodate. At least two cases have equated this standard with the "deliberate indifference" standard used here. *Memmer v. Marin County Courts*, 1999 WL 104739 at *2 (9th Cir. 1999); *Proctor v. Prince George's Hospital Center*, 32 F. Supp.2d 820, 829 n.6 (D.Md. 1998). In truth, then, there is no conflict for this Court to resolve.

4. Resolution of the standard of intent would not make a difference in this case in any event. Regardless of whether the Ninth Circuit's "deliberate indifference" standard is the same as the Second and Seventh Circuits' "knowing, deliberate or willful refusal to accommodate," or whether it lies somewhere in between "knowing,

deliberate, willful" and "discriminatory animus," petitioners' evidence did not show intentional discrimination under any definition of that term. Under no circumstance has any federal appellate court found a public entity liable for damages under Title II or the Rehabilitation Act where, as here, the entity made every attempt to **give** access rather than deny it, and where the discriminatory impact of the service it provided was not obvious and not known or intended. The Court should deny certiorari.

III. THE COURT SHOULD DECLINE TO ADDRESS PETITIONERS' FACTUAL ISSUE

1. As noted above, petitioners steadfastly maintained in the trial court that **no** genuine issue of fact existed. They never contended that the facts were disputed or that a fact question existed. They argued in a cross-motion for summary judgment that they were entitled to damages as a matter of law. CR 219 at 2, 6. They cannot now assert that a fact issue exists.

2. Petitioners misstate the record in declaring that the Ninth Circuit "acknowledged the existence of significant factual disputes." Pet. at 22. The Ninth Circuit actually stated, "The district court found that there were no genuine issues of material fact in dispute which under the common summary judgment standard would preclude summary judgment in favor of the City and Commander Rodabough, nor do we." Pet. App. at 16. The court of appeals held that petitioners' evidence simply and completely failed to show any intent to discriminate. *Id.* ("any evidence of deliberate indifference or discriminatory animus is totally lacking"). The Court should deny

certiorari. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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